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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 756

NEWS SYNDICATE CO. INC.,

Petitioner,

—against—

GEORGE W. SMILEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In the

Supreme Court of the United States

October Term, 1970

No. ——

News Syndicate Co. Inc.,

Petitioner,

—against—

George W. Sarah,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

In this action for libel and invasion of privacy, based upon newspaper reports of a judicial proceeding, petitioner, News Syndicate Co. Inc. respectfully prays that a writ of certiorari issue to review final rulings of law of the Court of Appeals of the State of New York on the ground that these rulings so violate First Amendment freedoms as to warrant their prompt review by this Court.

Opinions Below

The opinion of the Supreme Court of the State of New York, County of New York, providing for an order favorable to petitioner, is unreported and is annexed as Appendix A. The Appellate Division unanimously affirmed without opinion. 32 A.D.2d 744 (1st Dep't 1969). The divided opinions of the Court of Appeals (4–3) are reported at 27 N.Y.2d 9 (1970) (Appendix B).

Jurisdiction

The judgment of the Court of Appeals was entered on July 1, 1970. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

Questions Presented

1. Are accurate newspaper reports of a judicial proceeding, published without malice entitled to the constitutional privilege afforded by this Court's holding in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny?

2. Is the petitioner, a newspaper publisher, entitled to a defense of truth as to claimed invasion of privacy arising out of current reports of a judicial proceeding?*

Constitutional and Statutory Privileges Involved

The constitutional and statutory provisions involved are set forth in Appendix C. They are the First and Fourteenth Amendments to the Constitution of the United States, Sections 50, 51 and 74 of the Civil Rights Law of New

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* The majority opinion flatly stated: ". . . truth is irrelevant to a charge of invasion of privacy" and ignored petitioner's citation of this Court's opinion in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1966).

York and Section 235 of the Domestic Relations Law of New York.

Statement of the Case

On February 20, 1967 respondent's third wife commenced an action for a judicial separation from respondent in the Supreme Court of the State of New York, County of New York, by the service and filing of a summons and complaint. An order to show cause and affidavits in support of a motion for temporary alimony, sole custody of the child, ownership of the home and counsel fees were also served and filed. On March 7, 1967 respondent (defendant therein) served his answering papers. On March 9, 1967 the motion was submitted to the Court.

Prior to the submission of the motion, respondent's wife gave petitioner's reporter copies of the pleadings and all papers filed in the judicial proceeding. On March 10, 1967, the day after the motion was submitted, a report of the proceeding was published in separate editions of petitioner's newspaper (first and second articles). On Friday, March 17, 1967 the decision of the court, which granted respondent's wife's motion, was published in the New York Law Journal and on Sunday, March 19, 1967 a report of that decision was also published by petitioner (third article). On April 3, 1967, the court signed an order based on the decision and on April 16, 1967 the final article complained of was published (fourth article). Other than a minor argument as to one of the articles, an argument ignored by all courts below, respondent has never contested the fact that the articles were accurate reports.

Respondent commenced this action on June 7, 1967. His complaint set forth causes of action for libel and for statutory invasion of privacy (New York Civil Rights Law Sections 50 and 51). By answer served on September 8, 1967, petitioner pleaded its statutory absolute privilege (New York Civil Rights Law Section 74) to make a fair and true report of a judicial proceeding (Second Defense) and a constitutional privilege to make a fair, true and accurate report of a judicial proceeding, without malice, as to all causes of action (Third Defense). It also pleaded truth as a defense to all causes of action (Fourth Defense) as well as a defense based on the First and Fourteenth Amendments (Fifth Defense).

Respondent moved to strike petitioner's statutory defense based on New York Civil Rights Law Section 74, its constitutional privilege to make a fair, a true and accurate report of the judicial proceeding, without malice, and its defense of truth as to the alleged invasion of privacy. Respondent moved to dismiss the affirmative defense which pleaded that application of Section 235 of the Domestic Relations Law to prohibit reports of matrimonial proceeding was an unconstitutional interference with the freedom of press. He also moved for leave to amend his complaint to plead falsity and malice as to the alleged invasion of privacy.

The Supreme Court of New York sustained the defenses with the exception of the Fifth Defense which was stricken on the ground that it was a legal conclusion and that it was academic because Section 235 of the New York Domestic Relations Law was inapplicable. It also granted respondent's motion for leave to amend to plead falsity

and malice. The Appellate Division affirmed, without opinion.

The Final Rulings of the Court of Appeals

On July 1, 1970, the Court of Appeals reversed the order of the Appellate Division and laid down two rules of law directly contrary to the mandate of the First and Fourteenth Amendments of the Constitution and the holdings of this and other courts.

Before this case reached the Court of Appeals, the lower courts of New York had ruled that petitioner was entitled to prove its defenses in the trial court. Now, four judges of the Court of Appeals (three dissenting) have stated as a matter of law that (1) "truth is irrelevant to a charge for invasion of privacy" based on news reports of a matrimonial proceeding, and (2) a defense based upon a constitutional privilege to fairly and truly report a judicial proceeding, without malice, is not sufficient in an action for libel or invasion of privacy where the reported proceeding was a matrimonial proceeding.

In making its second ruling, the Court relied upon Section 235 of the Domestic Relations Law. This statute prohibits a court officer or his clerk from permitting any examination of matrimonial papers in his custody except by a litigant or his attorney or by court order. The Court held that Section 235 evidenced public policy of the State to afford general secrecy to reports of matrimonial actions. It is a fact, however, that petitioner obtained its information neither from the court files nor from any officer of the court, and no court has held that petitioner violated Section 235.

Reasons for Granting the Writ

At the outset, it is noted that a final judgment in the sense of a judgment based on a jury's verdict is not here involved. However, petitioner here seeks a review of definitive rulings, binding upon the Trial Court, that are of general application to publishers and that are so invasive of the freedom of press that a prompt review of these rulings is warranted.

Petitioner submits that the rulings of the Court of Appeals have a very real chilling effect upon freedom of the press and as noted by this Court in *Mills* v. *Alabama*, 384 U.S. 214 (1965), justify a prompt review by this Court. As pointed out, in *Mills*, to await a final judgment:

> "would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets."

In *Mills*, the petitioner had been indicted under a criminal statute. But a civil action "may be markedly more inhibiting than fear of prosecution under a criminal statute" where safeguards of a criminal action are not available. *New York Times* v. *Sullivan*, 376 U.S. 254, 277 (1964).

We submit that these rulings of the highest State Court, which are binding upon all New York State publishers and lower courts, are ripe for review by this Court. Indeed, unless reviewed by this Court now, these restrictive unconstitutional determinations may not be subject to review for many years.

These Rulings Conflict With the First and Fourteenth Amendments of the Constitution of the United States.

(a) *There is a constitutional privilege to make accurate reports of judicial proceedings, without malice.*

The issue here is whether an accurate report of a judicial proceeding is constitutionally protected. In *New York Times Co.* v. *Sullivan*, this Court held that in view of the First Amendment, a report of the actions of a public official or, as it were, a report of official proceedings, could not be the basis for a defamation action, unless plaintiff could prove actual malice as defined in that case. Since 1964 a body of law has extended the *Times* doctrine to not only reports of official proceedings but also to reports concerning matters of public interest and to private individuals speaking out on matters of public interest. Petitioner submits that a report of a judicial proceedings, whatever the subject matter, is as much entitled to that privilege as are articles concerning baseball players, gamblers or persons involved in official or legislative proceedings.

The privilege afforded by *Times* v. *Sullivan* is but a logical extension of the protection given First Amendment freedoms in civil and criminal cases. Indeed, although this Court has noted in the past that a civil action for defamation may have a more chilling effect than a criminal prosecution, a criminal action predicated upon reports of pending lawsuits cannot be brought unless there is a "clear and present danger" to the administration of justice. *Craig* v. *Harney*, 331 U.S. 367, 374 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1945). As this Court stated in *Craig:*

> "There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government to suppress, edit, or censor events which transpire in proceedings before it."

If a State is proscribed from using reports of judicial proceedings as the basis for criminal actions against publishers, it would seem that the State through its judiciary is constitutionally barred from denying a publisher the privilege afforded by the First Amendment to make accurate reports of any judicial proceeding, published without malice, unless it can be shown that a clear and present danger to the administration of justice exists. See *Dorfman* v. *Merszner*, 39 U.S.L. Week 2014 (7th Cir. 1970).

It may be argued by respondent that because the judicial proceeding in this case was a matrimonial action, it did not involve a matter worthy of First Amendment protection in light of Section 235 of the Domestic Relations Law. It should be noted that Section 235 is not a general secrecy statute, although obviously, the Court of Appeals so read it.

The Court below evidently found that the reporting of the matrimonial action violated broad public policy of New York. The implications of this holding are grave when applied to petitioner's constitutional privileges. In sum, the ruling below was a determination of what judicial proceedings could or could not be reported. We submit, further, that a court may not constitutionally pick and choose what is newsworthy where reports of judicial proceedings are involved, but may proscribe such reports only where a clear and present danger exists to the administration of justice.

(b) *As to invasion of privacy, truth is a defense.*

This Court had before it in *Time, Inc.* v. *Hill*, an exception to the New York statutory invasion of privacy called the "newsworthy" exception. There, this Court held that where a matter was newsworthy, the publisher would not be liable for violation of the statute unless it could be proved that the matter was false or fictionalized and that the publisher had published with malice.

This exception to the common law and New York's statutory invasion of privacy also relates to items of current or fresh news. *Wagner* v. *Fawcett*, 307 F.2d 409 (7th Cir. 1962); *Binns* v. *Vitagraph Co.*, 210 N.Y. 51, 56 (1913); *Sidis* v. *F-R Pub. Corporation*, 34 F. Supp. 19 (S.D.N.Y. 1938); affd. 113 F.2d 806 (2nd Cir. 1940), cert. den. 311 U.S. 711 (1940); *Lahiri* v. *Daily Mirror*, 162 Misc. 776 (Sup. Ct. N.Y. Co. 1937). In *Binns* the Court said:

> "It would not be within the evil sought to be remedied by that act [Sections 50 and 51 of the Civil Rights Law] to construe it so as to prohibit the use of the name, portrait or picture of a living person in truthfully recounting or portraying an actual current event as is commonly done in a single issue of a regular newspaper."

In this case, Justice Sarafite at Special Term recognized that the articles complained of were indeed current news, permitted respondent to amend his answer to plead falsity and malice by reason of the rationale of this Court in *Time, Inc.* v. *Hill* and held that truth was a defense in such circumstance.

In *Time, Inc.* v. *Hill* this Court upheld the constitutionality of New York's right of privacy statute on the assumption that truth was a complete defense to such cause of

action. That case did not even involve an item of current news. Here, petitioner submits, is a case that does involve current news: *a fortiori* the rule of *Time, Inc.* v. *Hill* should apply.

While recognizing that a truth defense was available to petitioner in an action for libel, the Court of Appeals held that if a plaintiff also asserts a claim for invasion of right of privacy, truth may not be proved as a defense. This is an instance of a giving and a taking away, merely by virtue of labels. Under this holding, no publisher can risk publishing an accurate and true account of any judicial proceeding that names the parties. The Court of Appeals disregarded the rationale and holding of this Court in *Time, Inc.* v. *Hill.*

The rejection of pleaded truth in this action exposes the press to risks that go far beyond "chilling" and constitutes a restraint upon freedom of press that violates the First Amendment.

CONCLUSION

We submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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